



**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
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<b>CHRISTOPHER ULLERY</b>	:	
<b>AND THE BUCKS COUNTY</b>	:	
<b>COURIER TIMES,</b>	:	
<b>Requester</b>	:	
	:	
<b>v.</b>	:	<b>Docket No.: AP 2019-0967</b>
	:	
<b>LOWER BUCKS COUNTY</b>	:	
<b>JOINT MUNICIPAL AUTHORITY,</b>	:	
<b>Respondent</b>	:	

On June 10, 2019, Christopher Ullery, a reporter for the Bucks County Courier Times (collectively “Requester”), submitted a request (“Request”) to the Lower Bucks County Joint Municipal Authority (“Authority”), seeking “the current contract between the ... Authority and S2A Technologies, Incorporated, as well as any invoices or payment statements between the Authority and S2A while the current contract has been in place.” On June 13, 2019, the Authority denied the Request, stating only that “[t]he Authority does not now or has ever had a contract with S2A Technologies; therefore[,] no payments have ever been made under contract to S2A.”<sup>1</sup>

On June 21, 2019, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure. Along with the appeal, the Requester

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<sup>1</sup> The Authority’s response was not in compliance with Section 903 of the RTKL. 65 P.S. § 67.903.

provided deposition transcripts discussing payments made to S2A. The OOR invited both parties to supplement the record and directed the Authority to notify any third parties of their ability to participate in this appeal. *See* 65 P.S. § 67.1101(c).

On June 28, 2019, the Authority submitted the affidavit, made under penalty of perjury, of Colleen Dunn, which states, in relevant part:

The Request ... is asking for information which does not exist. The question posed is whether there is a current contract. The answer is, no. If there is no current contract than there can be no invoices or payment statements between the ... Authority and S2A Technologies “while the current contract has been in place.”

It is pure sophistry to argue that “no contract exists” is to say that there is no agreement to pay for services rendered.

The records which may exist, and can be obtained, should be through a properly and artfully drawn request for these records. I stated there is no contract; therefore[,] no payments have ever been made under a contract with S2A Technology. I did not state that there can be no records. The response is for records “while the current contract has been in place.”<sup>2</sup>

“The burden of proving a record does not exist ... is placed on the agency responding to the right-to-know request.” *Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011). Under the RTKL, an attestation made under the penalty of perjury may serve as sufficient evidentiary support of the nonexistence of records. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). However, conclusory statements are not sufficient for an agency to meet its burden of proof. *See Office of the District Attorney of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden

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<sup>2</sup> The remainder of the affidavit objects to the Requester’s inclusion of “incomplete” deposition transcripts. However, for purposes of this final determination, the OOR focuses on the affidavit of Ms. Dunn rather than the contents of the transcripts.

of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted).

Ms. Dunn attests that no “contract” between the Authority and S2A exists; however, she acknowledges that an “agreement to pay for services rendered” exists. The Authority does not explain how such an “agreement” does not constitute a “contract.”<sup>3</sup> Based on the Authority’s position, Ms. Dunn’s statements that no records exist are simply not credible. As a result, the Authority has not met its burden of proving that no responsive records exist. *Hodges*, 29 A.3d at 1192.

For the foregoing reasons, the appeal is **granted**, and the Authority is required to provide all responsive records to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Bucks County Court of Common Pleas. 65 P.S. § 67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

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<sup>3</sup> In fact, there is no distinction between the terms. The term “contract” is commonly defined as “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” BLACK’S LAW DICTIONARY 389 (10<sup>th</sup> ed. 2009). Merriam-Webster defines “contract” as “a binding agreement between two or more persons or parties” and “a business arrangement for the supply of goods or services at a fixed price.” See <https://www.merriam-webster.com/dictionary/contract>, last accessed Aug. 1, 2019. An “agreement to pay for services rendered” clearly and unambiguously meets those definitions.

<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**FINAL DETERMINATION ISSUED AND MAILED: August 2, 2019**

/s/ Kyle Applegate

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APPEALS OFFICER  
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